

N2s2SmiS kjc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

21 Cr. 280 (AKH)

5 JAYQUAN SMITH,

6 Defendant.

7 -----x

Sentencing

8 February 28, 2023

9 11:05 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

18 BY: ALEXANDRA ROTHMAN

Assistant United States Attorney

19 DAVID TOUGER

20 Attorney for Defendant

N2s2SmiS kjc

(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record.

MS. ROTHMAN: Good morning, your Honor. Alexandra Rothman for the United States.

THE COURT: Good morning, Ms. Rothman.

MR. TOUGER: Good morning, your Honor. David Touger --

THE COURT: Remain seated.

MR. TOUGER: Good morning, your Honor. David Touger for Mr. Jayquan Smith.

THE COURT: Good morning. Good morning, Mr. Smith.

Mr. Smith, I am deeply sorry that we could not arrange our facilities to allow you to visit your son in the funeral home and to tend to his funeral. There are few things more sad than when a son precedes the death of a parent, and not to be able to see that person is a very serious matter. I hope you forgive me.

Let's start now. I am here to sentence you, Mr. Smith. Have you read the presentence investigative report?

THE DEFENDANT: Yes.

THE COURT: Have you discussed it with Mr. Touger?

THE DEFENDANT: Yes.

THE COURT: Mr. Touger, are there any factual errors

N2s2SmiS kjc

1 that you want me to correct?

2 MR. TOUGER: Not at this point, your Honor.

3 THE COURT: At any point?

4 MR. TOUGER: They have all been made correct, your
5 Honor.

6 THE COURT: Okay.

7 Government? Ms. Rothman?

8 MS. ROTHMAN: I have, your Honor. No corrections.

9 THE COURT: The facts are as stated in the presentence
10 investigative report.

11 Before I get into the calculation, Mr. Smith pleaded
12 guilty to Count Seven and Ten. One of those counts is a count
13 that charges a crime for having a gun in furtherance of a
14 violent crime. Since the violent crime is an attempt, how can
15 we consider it a crime of violence as contemplated by the
16 Supreme Court in *United States v. Taylor*, a decision of 2022?

17 MS. ROTHMAN: Your Honor, I am not sure the Court
18 needs to engage in the attempt analysis given that the charge
19 is also an assault with a dangerous weapon. And so I think
20 the Court could find that the assault with a dangerous weapon
21 would qualify as a crime of violence.

22 THE COURT: The crime he pled guilty to was Count
23 Ten.

24 MS. ROTHMAN: He pled guilty to Count Seven and Count
25 Ten. Count Seven charges attempted murder and assault with a

N2s2SmiS kjc

1 dangerous weapon in aid of racketeering under 18 U.S.C.

2 1959(a)(3), (a)(5), and 2.

3 THE COURT: The crime with which he is charged in
4 Seven is racketeering. The caption adds "assault with a
5 dangerous weapon," but there is no allegation that that is the
6 crime. That is a means for committing the crime and not a
7 categorical element of the crime, because racketeering can be
8 accomplished in various ways that involve nonviolent
9 activities.

10 MS. ROTHMAN: Your Honor, if I may, Count Seven
11 charges the defendant with a violent crime in aid of
12 racketeering, not with just racketeering, like a racketeering
13 conspiracy. That's Count One. And so, your Honor, I would
14 submit that Count Seven, the violent crime in aid of
15 racketeering, is a crime of violence such that Count Ten --
16 actually let me clarify the defendant pled guilty to two
17 counts—Count Seven and Count Ten.

18 Count Seven charges a violent crime in aid of
19 racketeering. There is no issue with that charge, as I see it,
20 even in light of *Taylor*.

21 Count Ten charges a use of a firearm in connection
22 with a different crime of violence, which is actually the
23 crime of violence charged in Count Nine. That's for the
24 December 21, 2020 shooting.

25 If the Court is concerned --

N2s2SmiS kjc

1 THE COURT: Give me a moment.

2 MS. ROTHMAN: Yeah, no problem.

3 (Pause)

4 THE COURT: Again, it raises the same problem.

5 MS. ROTHMAN: Your Honor, I would want to look back
6 at the law on what the government's position is with respect
7 to attempted murder following the *Taylor* decision. *Taylor*, if
8 I recall, involved Hobbs Act attempted robbery. I don't
9 believe it involved an attempted murder offense.

10 THE COURT: That's true, but the nature -- robbery by
11 its nature is a violent crime. It's a crime that, through
12 force, coercion, or the like, takes property from another. An
13 attempt is not necessarily a violent act.

14 MS. ROTHMAN: Your Honor, I think—and, again, if the
15 Court would like briefing, I think we could adjourn today's
16 sentencing and put in a letter to address the Court's
17 questions with respect to this, but --

18 THE COURT: On the present record, I would not add
19 any element -- I would not add the mandatory minimum to Count
20 Ten.

21 MS. ROTHMAN: So, your Honor, I think, then, in light
22 of that --

23 THE COURT: I would take that into consideration in
24 punishing for Count Seven.

25 MS. ROTHMAN: Your Honor, I think what I would like

N2s2SmiS kjc

1 to do is brief for the Court the question the Court has raised
2 with respect to the attempted murder, the 924(c) based off of
3 an attempted murder. My recollection is that our office is
4 still taking the position that it is a crime of violence, but I
5 would like to put that --

6 THE COURT: I believe that's right. I believe that
7 you take that position.

8 MS. ROTHMAN: But I would like to --

9 THE COURT: You took that position with all attempts.
10 Indeed, I felt the same way.

11 MS. ROTHMAN: I think our position, again, I would
12 like to put it in writing for the Court's review. I do think
13 that the defendant has pled guilty to a crime that carries a
14 mandatory minimum sentence, he's pled guilty to engaging in
15 multiple shootings, and it's important that the Court
16 considers all of that in advance of sentencing.

17 THE COURT: He did, he did, he certainly did, and I
18 accepted the plea. But the legal sufficiency of an indictment
19 is not satisfied by a plea. If the count is legally
20 insufficient, that can be raised at any time.

21 MS. ROTHMAN: I understand that, your Honor.

22 THE COURT: We might as well get it raised now.

23 If I sentence on the basis that Count Ten stands as
24 it is with this seven-year mandatory minimum, and even though
25 I might sentence to a larger amount under Count Seven, it

N2s2SmiS kjc

1 would be back from the Second Circuit if the Second Circuit
2 agrees with *Taylor* and extends it to this kind of a case. So
3 we might as well resolve it now.

4 MS. ROTHMAN: Okay.

5 THE COURT: We can resolve it in the wrong way, it's
6 also true, but what do you think, Mr. Touger?

7 MR. TOUGER: Your Honor, just to add my two cents,
8 that is the government position, which is why the plea offer is
9 where it is. And they are still maintaining that to this day,
10 as being, Ms. Rothman stated, *Taylor*, they are saying --

11 THE COURT: What are you saying, that you want to take
12 back your plea?

13 MR. TOUGER: No. I'm not saying that, your Honor.
14 That's why we took the plea, because we don't -- the
15 government had their position, but the Court can solve the
16 problem itself. As the plea agreement states and we all know,
17 the Court has last say over what is legal and what is not.

18 THE COURT: I missed you. Sorry. Say that again.

19 MR. TOUGER: The plea agreement and we all know that
20 the Court has the last say on what the guidelines will be and
21 what is legal and what is not. So I would agree with the
22 Court that there is no reason to brief it because we are just
23 going to be back here where we are right now. The government
24 is going to have that position, which we feel is incorrect,
25 which obviously the Court feels is incorrect. So I don't think

N2s2SmiS kjc

1 wasting time, money, and effort in briefing is necessary. I
2 think the Court should move forward with its suggestion.

3 THE COURT: I think the briefing is necessary because
4 I have to decide -- the issue I have to decide in the best way
5 I can, and it will be better to have a consideration of the
6 government's position and yours.

7 MR. TOUGER: Well --

8 THE COURT: There is another question, too, that I
9 need to explore, and that is whether there is an upward
10 adjustment for using a gun. I know that Mr. Smith was first
11 charged with being a felon in possession. That charge has
12 disappeared in the superseders.

13 MR. TOUGER: Yes.

14 MS. ROTHMAN: I wouldn't say it disappeared. The
15 defendant -- in the superseding indictment, the
16 felon-in-possession charge was included. That is the S1
17 indictment. The defendant's plea contemplates that he pled
18 guilty to two counts, and while he didn't plead guilty to the
19 felon-in-possession charge, it was included in a footnote that
20 he acknowledged and admitted that on the day in question he in
21 fact possessed a gun and discharged it.

22 THE COURT: Well, that's part of the crime that you
23 are charging in Ten.

24 MR. TOUGER: Correct.

25 MS. ROTHMAN: Not exactly, your Honor. The crime in

N2s2SmiS kjc

1 Count Ten is based off of a December 21, 2020 shooting. The
2 crime that the defendant was charged with being a felon in
3 possession for was a shooting on April 21 of 2021.

4 THE COURT: But you want me to take all three
5 incidents into account when I sentence.

6 MS. ROTHMAN: I think the Court should, your Honor,
7 yes.

8 THE COURT: Yes, so -- as related acts.

9 MS. ROTHMAN: Correct, your Honor.

10 THE COURT: So I am asking, am I taking it into
11 consideration, is there an upward adjustment for a use of a
12 gun if I don't consider the gun charge as a charge in itself
13 because it's --

14 MR. TOUGER: Well, my suggestion would be no, because
15 the plea agreement doesn't contemplate that in its
16 calculations, that he should -- the Court can certainly
17 consider that.

18 THE COURT: What's no?

19 MR. TOUGER: Well, that there shouldn't be another --
20 added points to his guidelines calculation. The Court can
21 certainly consider those acts.

22 THE COURT: I don't understand. I get what you mean.
23 I can consider those acts, but without adjusting the
24 guidelines.

25 MR. TOUGER: Exactly, your Honor.

N2s2SmiS kjc

1 THE COURT: Yes. I can use it, for example, in
2 varying upwards from the guidelines.

3 MR. TOUGER: Excuse me?

4 THE COURT: I can use it, for example, in varying
5 upwards from the guidelines.

6 MR. TOUGER: I would hope the Court wouldn't but, yes,
7 it could.

8 THE COURT: I know you want me to give him seven
9 years.

10 MR. TOUGER: That's correct, your Honor.

11 THE COURT: But your thinking may be in error, too,
12 because you are assuming that that is a legally sufficient
13 charge.

14 MR. TOUGER: Well, no, your Honor, my thinking was
15 taking everything -- when you look at the case from a 30,000
16 foot level I did not want to go to trial because the
17 guidelines would have been obviously a lot higher and the
18 punishment would have been a lot higher. This was the plea
19 that was offered, so that's why we took it. My feeling is
20 that seven years is not -- is a crime -- is a time that sort
21 of fits the crime, so whether it's the mandatory minimum or
22 not, I think seven years is adequate punishment.

23 THE COURT: For all of the reasons you have given in
24 your submission.

25 MR. TOUGER: Exactly.

N2s2SmiS kjc

1 THE COURT: Okay. I understand.

2 So we should postpone this.

3 MS. ROTHMAN: We are happy to put in a letter that
4 articulates why we still believe that --

5 MR. TOUGER: Your Honor, I --

6 MS. ROTHMAN: -- a crime of violence predicated on an
7 attempted murder, a violent crime in aid of racketeering based
8 on attempted murder is sufficient. I think that would be
9 helpful so the Court has all the information in advance of
10 sentencing.

11 THE COURT: I agree.

12 You were saying, Mr. Touger?

13 MR. TOUGER: I just don't see the value in the
14 government repeating its position in a letter. We are just
15 going to be back here with the Court in the same instance.
16 The law is the law. The government is going to say they don't
17 agree with it. I'm going to say I agree with it. And
18 unfortunately, your Honor, you wear the robes and you have to
19 make your decision.

20 What I would suggest is that we continue with the
21 sentencing for the very reason that Mr. Smith has been in the
22 MDC for 25 months and the MDC is just a horrible place, still
23 is, even after COVID, it still is basically they sit in
24 lockdown almost every day and --

25 THE COURT: He would like to be assigned to the

N2s2SmiS kjc

1 facility --

2 MR. TOUGER: We would like to move the case forward
3 and --

4 THE COURT: -- where he will serve.

5 MR. TOUGER: Right.

6 And I think the ultimate decision the Court is going
7 to make is it can't use the mandatory minimum. I understand
8 that, but it won't change my suggestion of what the sentence
9 should be and I don't think it will change the government's
10 position of what they think the sentence should be and,
11 frankly, I don't think it would change the Court's mind of
12 what it thinks the sentence should be.

13 THE COURT: I'm going to go ahead and sentence now,
14 and I will hold that Count Ten refers back to the crime
15 alleged in Count Nine. Count Nine alleges a crime of
16 racketeering through a criminal enterprise, performing acts
17 involving violent and nonviolent offenses.

18 For example, a distribution of controlled substances
19 in violation of Title 21 would be considered a nonviolence
20 offense and there are other nonviolent offenses, including the
21 fraud committed on the New York disability insurance.

22 So on racketeering although it is alleged that it was
23 committed in a certain way, which is a violent way, as alleged,
24 in consideration for a payment or a promise to pay something
25 of pecuniary value from the gang and for the purpose of

N2s2SmiS kjc

1 enhancing his position in the gang, knowingly assaulted an
2 individual with a dangerous weapon and knowingly attempted to
3 murder and aided and abetted --

4 MR. TOUGER: Your Honor, nobody was injured at all in
5 Mr. Smith's counts.

6 MS. ROTHMAN: Your Honor --

7 THE COURT: Attempted to murder.

8 MS. ROTHMAN: Your Honor --

9 MR. TOUGER: No assault, there was no assault, either.
10 There was an attempted assault.

11 MS. ROTHMAN: Your Honor, if the --

12 THE COURT: I'm looking at the allegation.

13 MS. ROTHMAN: Your Honor, if the --

14 THE COURT: Knowingly assaulted.

15 MR. TOUGER: Yes, but Mr. Smith did not plead to
16 any -- in none of Mr. Smith's shootings was anybody hit.

17 MS. ROTHMAN: He pled to attempting to kill, that's
18 correct.

19 THE COURT: Okay.

20 MR. TOUGER: Attempting to assault.

21 MS. ROTHMAN: If the Court is inclined to, I guess,
22 vacate the Count Ten guilty plea, I think it is important that
23 the government puts in legal authority on its position as to
24 why the Court should not do that. That is for a couple of
25 reasons.

N2s2SmiS kjc

1 Without Count Ten, the maximum sentence that the
2 Court could impose changes quite dramatically in this case.
3 There is a 20-year maximum sentence on Count Seven. With
4 Count Ten, that maximum can go much higher. Probation has
5 recommended quite a lengthy sentence, consistent with the
6 government's recommendation, and I don't think it is
7 appropriate to --

8 THE COURT: Probation has recommended ten years.

9 MS. ROTHMAN: No, your Honor. Probation has
10 recommended --

11 MR. TOUGER: 17 years, your Honor.

12 MS. ROTHMAN: -- 17 years, your Honor, which I
13 recognize is less than 20 years, but I do think that the Court
14 should get it right, and I think it would be helpful for the
15 government to provide the legal authority as to why --

16 THE COURT: I don't think there is binding legal
17 authority.

18 MR. TOUGER: There is no legal authority for Count
19 Ten, and my position would be, your Honor, even if you vacate
20 Count Ten, the Court still has leeway to go anywhere it wants
21 to go in sentencing.

22 THE COURT: Yes.

23 MS. ROTHMAN: I'm not sure the defense can argue that
24 the Court should vacate Count Ten under the plea agreement.

25 MR. TOUGER: I can't. I am just saying -- I'm not

N2s2SmiS kjc

1 arguing that --

2 THE COURT: I brought it up, right?

3 MS. ROTHMAN: Yes, your Honor.

4 THE COURT: I brought it up, and I am sentencing
5 today as if Count Ten is a legally insufficient count because
6 attempt is not a crime of violence and racketeering is not
7 necessarily a crime of violence applying the categorical
8 approach involved in the Supreme Court decisions. All right.
9 So that's where we are with that.

10 Now I am going to make the findings that I need to
11 make as to the guidelines.

12 I think the calculation that both sides have come to
13 in their agreement is 30, and the probation department wants
14 to up that by considering Mr. Smith a career offender. I
15 decline to do that. Again we run into attempts and whether
16 they are violent offenses or not. So I think we have a level
17 of 30 followed by eight criminal history points. Six have
18 been calculated by the parties for the youthful offender
19 attempts, robbery attempts, and two more because this crime
20 was committed while Mr. Smith was still involved in parole
21 under his previous offense. That puts us in offense level 30,
22 criminal history category IV, which yields a range of custody
23 of 135 to 168 months.

24 Before I finish off on this, is there an adjustment,
25 upward adjustment because a gun was used?

N2s2SmiS kjc

1 MR. TOUGER: Sorry, your Honor. I didn't hear the
2 question.

3 THE COURT: Is there an upward adjustment because a
4 gun was used in the commission of the crime?

5 MS. ROTHMAN: Your Honor --

6 THE COURT: I did a quick look, and I couldn't
7 find --

8 MS. ROTHMAN: Your Honor, I don't know the answer to
9 that question. If I could just go back to the career offender
10 calculation, I think for purposes of the guidelines the
11 defendant's attempted robbery conviction still qualifies as a
12 crime of violence, and that's under 4B1.2.

13 THE COURT: Yes, I know it says that, but I'm
14 applying what the Supreme Court has been doing. I hesitate to
15 call him a career offender. And I don't think it's apt
16 because he is too young and I wouldn't call him a career. He
17 was a youthful offender. Whether he straightens out or not, I
18 don't know, but I don't think career offender fits the bill,
19 and I'm not going to find it.

20 MR. TOUGER: Your Honor, as far as the other question,
21 I would say the government is bound by the plea agreement as
22 far as the other question.

23 THE COURT: Well, you tell me, Mr. Touger.

24 MR. TOUGER: Just like I can't argue -- I couldn't
25 argue without the Court bringing up the dismissed Count Ten,

N2s2SmiS kjc

1 they can't argue to change the guidelines. They are locked in
2 by the plea agreement.

3 THE COURT: Well, I'm not sure because I'm changing
4 things so much that they are not. Customarily if you have a
5 count that charges the illegal use of a gun, then you don't
6 make the upward adjustment. What is the crime where it is an
7 upward adjustment?

8 MS. ROTHMAN: I'm not sure I follow the Court's
9 question, your Honor.

10 THE COURT: There is a place in the guidelines where
11 you make a two-level upward adjustment. For an aggravated
12 assault, you make a four- or five-point upward adjustment. An
13 aggravated assault has not been charged.

14 MS. ROTHMAN: Is the Court thinking about the, like,
15 2A1.2 guidelines for aggravated assault with a dangerous
16 weapon? I'm not sure I understand what section of the
17 guidelines the Court is referring to.

18 THE COURT: I'm not. I'm hunting.

19 2A1.2, secondary, is second degree murder.

20 MS. ROTHMAN: 2A --

21 THE COURT: Aggravated assault, assault with intent
22 to commit murder is 2A2.1.

23 MS. ROTHMAN: Right. And --

24 THE COURT: An aggravated assault is 2A2.2 and the
25 upward adjustment for use of a gun is 2A2.2(b)(2).

N2s2SmiS kjc

1 MS. ROTHMAN: Right. But because the defendant has
2 agreed that 33 is the correct base offense level for Count
3 Seven, because it was -- it would have been first degree
4 murder, this is a premeditated attempt to kill, your Honor,
5 there is no enhancement for gun, possession of a gun, and so I
6 don't think there would be any additional points there.

7 If I thought I understood the Court's questions, that
8 related to the April shooting which is sort of considered
9 relevant conduct in this plea agreement, I don't think, as
10 Mr. Touger noted, there is an upward departure from the
11 guidelines, but I do think the Court can vary in light of sort
12 of the repeat nature of the defendant's criminal acts.

13 THE COURT: All right, so I find that the guidelines
14 yield at level -- I find that the net offense level is 30, that
15 the criminal history category is IV, and that the recommended
16 range of custody is 135 to 168 months. Do you agree with that?
17 Your answer is, no, you don't.

18 MS. ROTHMAN: I don't, your Honor.

19 THE COURT: All right. But assuming I am correct in
20 my analysis with Count Ten, do you agree? I guess --

21 MS. ROTHMAN: I'm not sure I do either, because I
22 think the Court should be -- in light of the Court's
23 questions, I think the defendant qualifies as a career
24 offender, and that's in light of his prior attempted robbery
25 convictions.

N2s2SmiS kjc

1 THE COURT: All right.

2 How about you, Mr. Touger?

3 MR. TOUGER: I agree with the Court.

4 THE COURT: I find 135 to 168 months as the indicated
5 range.

6 Now, I think the guideline provision for supervised
7 release is one to three years, am I correct?

8 MR. TOUGER: Your Honor, I'm sorry. I missed that
9 question.

10 THE COURT: What is the extent of supervised release?

11 MR. TOUGER: I believe it is one to three years, your
12 Honor.

13 THE COURT: Yes.

14 MS. ROTHMAN: I think that's right, your Honor.

15 THE COURT: I so find.

16 I have read all your materials, Mr. Touger, but make
17 believe I haven't and you can talk to me about your client.

18 MR. TOUGER: Thank you, your Honor. I won't make
19 believe you haven't, because I know the Court has and the
20 Court has digested it, so I will try not to repeat myself.

21 THE COURT: Well, it's true. I can summarize it.

22 Mr. Smith grew up in an impoverished household. His
23 father was missing. His mother had to provide for I think four
24 children. She couldn't take care of the kids and provide. Her
25 ability to provide was quite meager. And so Mr. Smith lived

N2s2SmiS kjc

1 with his grandmother until she died, and he went back to his
2 mother.

3 He made various efforts to lead a productive life,
4 but he was unable to do so. Mr. Touger would have me believe
5 that the circumstances that caused him to get involved with
6 gang life and gang crimes were circumstances of necessity
7 because of inability to provide, first, when he was younger
8 because of conditions I mentioned before and, second, when he
9 was older, when the pandemic caused a loss of his employment
10 and he couldn't find other employment.

11 The government points out that Mr. Smith did not just
12 simply engage in a crime of theft, which would be perhaps
13 somewhat understandable in Mr. Touger's analysis to find money
14 for food or other necessities, but it was a crime of violence,
15 attempted robbery, and the circumstances of those robberies
16 were pretty nasty. Given that and given difficulties of
17 fighting in jail, the government feels that I should be
18 considering Mr. Smith to the sentence that was agreed to in
19 the agreement. That is something between 205 and 235 months.

20 All right, Mr. Touger, so we have a level between
21 seven --

22 MR. TOUGER: Thank you.

23 THE COURT: -- years and 17 years or 18 years.

24 MR. TOUGER: Thank you, your Honor.

25 Your Honor, just picking up where the Court left off,

N2s2SmiS kjc

1 I want to refer the Court to the studies that I mentioned in
2 my sentencing letter and how Mr. Smith's early life and
3 teenage life affected his decision-making, really, abilities
4 as he grew older. And the studies -- and this is from a
5 Harvard study of many thousands of people -- show that it is
6 almost like a post-traumatic stress disorder, in that their
7 brain capacity is really weakened. It is not just the
8 emotional problems that are faced by that, it is the fact that
9 their actual ability to think through and make valid decisions
10 is affected by their upbringing and their circumstances. And
11 I think that's very important for Courts to start to consider
12 in these situations as many young black, Hispanic, white
13 impoverished people come before the Court in these situations.

14 THE COURT: But most living in that kind of
15 circumstance are honest and don't commit crimes.

16 MR. TOUGER: I agree, your Honor. I'm not -- I don't
17 want the Court to take my argument as an excuse or a reason,
18 but it's as an explanation, and that some people do have the
19 willpower to fight their way through and make it through and
20 some people find some male role model to look up to. Some
21 people have very strong family situation that gets them
22 through, yes. Many, many people get through this situation in
23 a completely lawful manner. But that doesn't discount the
24 fact that what these studies show is that people who are
25 brought up in this situation really do not have the brain

N2s2SmiS kjc

1 capacity that people who are brought up in my situation, and I
2 don't know how the Court was brought up, but I would guess in
3 the Court's situation. And even though my father passed away
4 when I was nine years old, I grew up in a situation where I
5 had family and family friends that sort of took over that
6 role. I had many male role models to look up to, whereas
7 Mr. Smith just didn't. His male role models were, as I said
8 in my letter, the people who ran in the street, who got to him,
9 and unfortunately he did not have the willpower and the
10 strength to fight back from that, and I think the Court should
11 first take that into consideration.

12 A. I think also the Court should take into consideration that
13 he has spent 25 months in the MDC, which means that he began
14 his sentence -- his incarceration during the height of the
15 COVID virus, and the MDC was even worse than it is now then.
16 It was just a horrible place to be. And I'm sure the Court has
17 heard these arguments and knows full well, so I won't go into
18 detail about everything that was going on back in the jail over
19 two years ago.

20 Mr. Smith got COVID twice since he's been in the MDC.
21 But to be completely honest, the conditions haven't improved
22 much. Even now that COVID numbers have waned, the conditions
23 still haven't. Most people -- most days, I should say, the
24 MDC is still in lockdown. They have a lack of manpower, which
25 I don't truly understand since they closed the MCC, why they

N2s2SmiS kjc

1 didn't bring enough employees over to the MDC, but they
2 haven't. And that is the excuse they continue to give, that
3 they don't have the manpower to allow inmates any kind of
4 life. They are literally locked down over 23 hours almost
5 every day, and it is just inhumane to do that to people.
6 There are no programs, or the programs keep getting
7 interrupted. There is very little athletic activity. There is
8 very little -- Sunshine, forget it; it just doesn't exist. The
9 conditions are poor. They are overcrowded. They are
10 understaffed.

11 It is amazing. I have people who are in the MDC who
12 were moved to Essex County to be incarcerated there, and they
13 just -- they feel like they have gone to a country club when
14 they got to Essex County. The people in Essex County who have
15 never been to the MDC feel like they are in the worst place in
16 the world. But everything is relative. And Mr. Smith has
17 spent 25 months already in the MDC.

18 But that's not even the worst punishment. And
19 granted, again, this is not -- Mr. Smith realizes he is in
20 jail because of his actions, and he takes full responsibility
21 for those actions, as you heard from him in his letter and will
22 hear from him after I am done, but not only -- his child was
23 quite young when he went into jail. He missed his whole
24 child's life, basically, since he is incarcerated. And then,
25 even though the Court had ordered that he be allowed to watch

N2s2SmiS kjc

1 a videotape of his son's funeral, he was not allowed to do
2 that. Basically he did not get to witness his son's funeral or
3 wake or anything else.

4 THE COURT: This is his two-year-old son.

5 MR. TOUGER: His two-year-old son, yes, your Honor.
6 And as the Court already mentioned, I can't think of anything
7 worse than that. And I have to say, to Mr. Smith's credit, he
8 took it much better than his family did. His family was quite
9 angry. There were numerous phone calls to me during the day,
10 complaining and yelling, but Mr. Smith himself was like, this
11 is my fault. I did what I did, and this is what I have to
12 live through. He was much calmer than I was and than his
13 family was.

14 THE COURT: You have noticed, I'm sure, that the
15 psychological impact of the crime and the punishment is worse
16 for the family than it is for the defendant.

17 MR. TOUGER: Agreed, your Honor. No doubt. But I
18 still was very impressed with how Mr. Smith, unlike a lot of
19 clients I have represented, took full responsibility for why
20 he was not at his son's funeral, whereas I have a lot of
21 clients who would have been yelling and screaming at me and
22 quite angry at the Court right now, and Mr. Smith --

23 THE COURT: Let me be open with you, so you can focus
24 your remarks. I am looking at he is 24 years old, so he's had
25 very little time to develop a life. But what I see in his

N2s2SmiS kjc

1 life are terrible things. So at a time when he was hungry
2 and not getting enough food, he commits a robbery and what
3 does he get out of the robbery? He gets out of the robbery a
4 jacket.

5 MR. TOUGER: Are you talking about the state -- the
6 one he has youthful offender treatment on?

7 THE COURT: Right. He got out, Take your jacket off
8 and beat him up with his fist, kicking him in the face multiple
9 times. And the second offense is much the same, it's a down
10 jacket that someone was carrying.

11 MR. TOUGER: Your Honor, it --

12 THE COURT: He took it away from him and beat him up
13 very badly. These are characteristics of violence.

14 MR. TOUGER: I understand that, your Honor. And
15 first of all, the jackets are worth a lot of money to be sold.
16 So the fact that he took a jacket doesn't mean that he wasn't
17 getting money for it to support himself. But even --

18 THE COURT: But it's, it's --

19 MR. TOUGER: The violence part of it I understand,
20 your Honor.

21 THE COURT: And you don't need to have an education
22 to know that it's wrong to take something from another and
23 it's wrong to beat up another person and it's wrong to kick
24 the other person in the face. You don't need education.

25 MR. TOUGER: You don't need education for that, your

N2s2SmiS kjc

1 Honor, and Mr. Smith certainly knows what he did was wrong.
2 He's never said what he did was right, called for, productive,
3 or anything else. What the studies -- and I don't think the
4 studies relate that this is the right activity. What the
5 studies show is that their minds don't necessarily make the
6 same connection that yours and mine do. And it's very hard
7 for us to put ourselves in that position.

8 THE COURT: The problem I get is an inference that if
9 things are bad, crime is okay.

10 MR. TOUGER: No, I'm not --

11 THE COURT: If things are bad violence is okay.

12 MR. TOUGER: Your Honor, I don't want the Court to
13 get that that's my argument. I don't think he should go
14 unpunished. I think seven years is a lot of time. Seven
15 years would basically be one-third of his life almost.

16 THE COURT: But he used a gun on three different
17 occasions.

18 MR. TOUGER: And I'm going to get to that, your
19 Honor. The gun violence that he is charged with here -- and,
20 again, I don't condone it, I don't condone anybody having a
21 gun, I don't understand when our society will get to the point
22 that it will learn that and just ban bullets. Forget the guns.
23 There are too many guns on the street now. If they ban them
24 now, it wouldn't do anything. Just stop the production of
25 bullets and we would solve the problem.

N2s2SmiS kjc

1 THE COURT: If you are in a gang and you want a gun
2 you can get a gun.

3 MR. TOUGER: Yes, exactly that's why this whole
4 idea --

5 THE COURT: Legally or illegally.

6 MR. TOUGER: Exactly, your Honor. That's why, just
7 to veer off the track for a second, I don't think gun control
8 is the right idea. I think just banning the production of
9 bullets, then we won't have any gun violence, because a gun is
10 worthless without bullets.

11 But, anyway, getting to the point here, your Honor,
12 he was not -- prior he did rob people when he was a much
13 younger person. His gun violence here is all gang related.
14 It's not against John Q. Public. It's not against the
15 law-abiding citizens of his neighborhood or anything else.
16 It's one gang against another gang. I'm not saying that's
17 right.

18 THE COURT: In society, where there are many innocent
19 people just minding their own business and walking on the
20 street, and all of a sudden involved in a gang fight --

21 MR. TOUGER: And that did not happen here. Nobody got
22 hit here.

23 THE COURT: It often happens.

24 MR. TOUGER: My point only is, your Honor, when we
25 are judging crimes and making sentences, we are have in a very

N2s2SmiS kjc

1 strange business. We have to judge -- there is gradations of
2 all crimes. And what makes a crime worse is if he went and
3 shot John Q. Public for a jacket. That would be a -- is one
4 way of using a gun. If he is threatened by another gang and
5 uses a gun, while still a crime and still wrong and still
6 something that shouldn't happen, it's a lesser crime than
7 taking a gun to John Q. Public. That's the only point I am
8 making.

9 And the Court has already sentenced a codefendant of
10 his, Mr. Bell, to seven years for a shooting --

11 THE COURT: The city streets belong to the public,
12 not --

13 MR. TOUGER: Agreed.

14 THE COURT: -- to a gang.

15 MR. TOUGER: I couldn't agree more. But the Court
16 has already sentenced Mr. Bell to seven years; and in his
17 shooting, two people got hit. Now, granted, he only has one
18 shooting that he is charged with. Mr. Smith has three
19 shootings. I understand that. But it would be a joke for us
20 to think -- stand here and think that Mr. Bell, that was the
21 only shooting that Mr. Bell ever did and Mr. Bell got seven
22 years and two people got hit in his shootings. Other people
23 charged in his indictment are getting much less than that.

24 So I am not asking you to give Mr. Smith probation or
25 two or three years. What I am saying, your Honor, is that

N2s2SmiS kjc

1 seven years is a hefty sentence, and he has already been
2 punished harsher in these first two years than anybody could
3 have contemplated when getting arrested or when people put up
4 the codes. Forget even the MDC conditions that he has lived
5 through and the fact that he's lost his son and will never be
6 able to spend another day with his son and didn't get to go to
7 his son's final services.

8 Now granted that is his fault and he admits that and
9 he has said that to me on more than one occasion, since this
10 happened both in phone calls and today, but that doesn't take
11 away from the fact that it did happen, and that that is
12 weighing on his mind that what he did and is punishment to
13 him. He understands that his actions have caused him to miss
14 out on something and now he is -- and his actions of
15 threatening the public safety with a gun deserve to be
16 punished, no doubt.

17 But I think the break between you and I, your Honor,
18 is I think seven years is an extensive sentence. He will be
19 30 years old when he gets out of jail. He will have spent
20 almost one third of his life in jail. That is an extensive
21 sentence, and I would ask the Court to find that that meets its
22 requirements, that it take into consideration both punishment
23 and mercy, and fits the crime to Mr. Smith.

24 Mr. Smith, while certainly has committed crimes in
25 the past, has also demonstrated to the Court that he can lead

N2s2SmiS kjc

1 a productive life. he had put the gangs and criminal activity
2 behind him and was leading a productive life until the
3 circumstances sucked him -- literally sucked him back in. And
4 I think the Court, while certainly can't -- doesn't condone it,
5 and there is no excuse for his actions about going back into
6 criminal conduct, the Court can see some light in Mr. Smith
7 that he did spend two or three years really being a public
8 asset, working, taking care of his family.

9 His son was, you know, born with numerous problems,
10 including autism. It was not an easy, you know, situation.
11 And so I think the Court should give -- there is ample to not
12 give him credit for, but there are some things in his life to
13 give him credit for, and I think the Court can rest assured
14 that Mr. Smith has now really learned his lesson. He
15 certainly seems to have convinced me, and not every client I
16 have has made that jump and has convinced me of that, but
17 Mr. Smith has certainly convinced me, and I have been doing
18 this 38 years. I know the Court has been doing it longer than
19 me, but I have been doing this 38 years, not two or three, and
20 Mr. Smith has certainly, I think, taken to heart what he has
21 done and how it has punished society, punished his family and
22 now will punish him. But I think he has learned his lesson and
23 I don't think he will appear in another court.

24 THE COURT: He was punished pretty clearly in state
25 court, two crimes of attempted robbery. You would think he

N2s2SmiS kjc

1 would have learned his lesson, right?

2 MR. TOUGER: We would have hoped, and I think he did,
3 and I think he proved that by getting out and doing --

4 THE COURT: You don't learn your lesson by further
5 crime. He was not alone in losing his job in the pandemic.

6 MR. TOUGER: I agree, your Honor, and again --

7 THE COURT: I think we are repeating.

8 MR. TOUGER: Yes, we are.

9 THE COURT: Let me hear Mr. Smith. You are allowed to
10 talk to me. Pull the mic up.

11 THE DEFENDANT: To address the Court, I take full
12 responsibility of my actions and everything I done in the
13 past; past when I did crimes that I did in the past, the state
14 crimes, probably crimes I didn't even get arrested for I
15 apologize for, and I take full responsibility.

16 I wrote a letter to address the Court, but it was
17 just speaking on like me bettering myself for me and my son
18 and getting out of New York. But now, like, that happened,
19 like, I have to rewrite it, but I was dealing with the funeral,
20 being denied, I didn't have enough time.

21 THE COURT: What happened to your son? Did he get
22 sick.

23 THE DEFENDANT: He had cancer.

24 THE COURT: Cancer.

25 THE DEFENDANT: Yeah. So I didn't have enough time

N2s2SmiS kjc

1 to rewrite it because I was dealing with getting through this
2 and dealing with being denied. But I knew being denied was my
3 fault because I'm incarcerated. So I don't put that blame on
4 nobody but myself. That's why I know now, like, I ain't going
5 to appear in front of no more judges. I already missed out
6 too much time on my son's life—walking, talking and now this.
7 It's, like, I don't want to appear in front of more judges. I
8 don't want to miss more time in my family's life.

9 That's pretty much it.

10 THE COURT: Ms. Rothman. Apart from Hassan Simmons,
11 have I sentenced anybody else?

12 MS. ROTHMAN: Your Honor, I believe the Court
13 sentenced James Bell to seven years, which was the mandatory
14 minimum sentence in his case.

15 THE COURT: And what's the difference?

16 MS. ROTHMAN: Well, your Honor, Mr. Bell committed
17 one shooting. Mr. Smith committed three. I recognize that in
18 Mr. Bell's shooting two individuals were hit, and that's
19 obviously a fact that the Court can, and I'm sure did,
20 consider, although there was a plea to a mandatory minimum
21 sentence. Mr. Smith is lucky that no one was killed during
22 his repeated acts of violence.

23 I want to respond to some of the suggestions by
24 Mr. Touger that this Court should care less about the
25 defendant's violence because it was only gang related. So I

N2s2SmiS kjc

1 disagree with that strongly.

2 THE COURT: So what?

3 MS. ROTHMAN: But even if the Court were to put any
4 stock in that argument, which I don't think it should, this
5 defendant is going on a public bus, the same bus that
6 hard-working New Yorkers take to go to work, to see their
7 families, he is pulling out a gun—there is a photo of that in
8 our sentencing submission—hopping off the bus, and is
9 captured on video shooting at people.

10 And it didn't stop there. He did it again and then in
11 April of 2021 --

12 THE COURT: What gathers from this, that he had
13 formed an intention to do something, and it wasn't just
14 something on the spur of the moment because he got caught in
15 some kind of violent act. He planned it --

16 MS. ROTHMAN: Your Honor, this is a premeditated
17 attempt to kill. The defense has stipulated to that
18 guidelines in the plea agreement, and it's repeated. It's
19 repeated, and you know it's premeditated based upon the
20 surveillance video. You know it is premeditated because he is
21 talking about his intent to kill the ops, the rival gang
22 members, on social media, and that's also in our sentencing
23 letter.

24 THE COURT: Yes, I've read your sentencing letter.

25 MS. ROTHMAN: So there is no argument here that, oh,

N2s2SmiS kjc

1 he got caught up in a moment, he was being shot at, so he
2 retaliated. No.

3 THE COURT: I don't think he is making that argument.

4 MS. ROTHMAN: And that's simply belied by the facts,
5 your Honor.

6 THE COURT: He is making the argument that twice he
7 tried to fit into society, things went wrong, he couldn't stay
8 with it, and now he will do it because he's learned his lesson.
9 That's basically his argument.

10 MS. ROTHMAN: And I don't think the facts support
11 that, your Honor. If I understand—and maybe I'm missing
12 something—what defense counsel is pointing to is that for a
13 period of time the defendant had a part-time job. But, your
14 Honor, you can work and also be a gang member, and this
15 individual admitted to his membership in the gang, admitted to
16 acts of violence in furtherance of that gang. There is really
17 nothing in this record to suggest he was trying to clean up
18 his life and do the right thing and then just fell back into
19 this. What you instead see—and this goes back to his
20 robbery, so he was younger—is a pattern of escalating
21 violence. Then it was robberies; now it's attempted murders,
22 shooting at people in the streets of New York.

23 And I will just note this, your Honor, the last
24 shooting, the April 2021 shooting, I remember learning about
25 that, we had an open investigation, we were preparing to

N2s2SmiS kjc

1 indict him and many of his codefendants for their membership
2 in the 800 YGz, and I get a phone call from a detective that I
3 know who just sees him on the street shooting at somebody out
4 of the blue.

5 They follow him. They apprehend him. They get the
6 gun. We charge that on a complaint. And then, as the Court
7 knows, we supersede in the indictment to add that as an
8 offense. This is somebody who, if not stopped by these
9 charges, would have -- I don't want to say he would have
10 killed someone, because we don't know, your Honor, but I feel
11 fairly confident to say that his acts of violence would have
12 continued over the summer of 2021.

13 There is a problem with gang violence in New York
14 City, and it's because of people like the defendant who pull
15 out guns and shoot people and try to kill people on the
16 streets of New York. And a seven-year sentence sends a
17 message that this Court doesn't care. A seven-year sentence
18 would send the message that you can do this, and there are no
19 real consequences.

20 THE COURT: How about a 14-year sentence?

21 MS. ROTHMAN: Your Honor, I think that the guidelines
22 in the plea agreement --

23 THE COURT: Ms. Rothman, how about a 14-year sentence?

24 MS. ROTHMAN: Respectfully, your Honor, it's not
25 enough.

N2s2SmiS kjc

1 THE COURT: That's a lot of years.

2 MS. ROTHMAN: I understand that, your Honor. There is
3 a public safety emergency.

4 THE COURT: He will be 38 when he gets out.

5 MS. ROTHMAN: Your Honor, this was repeated attempts
6 to kill.

7 THE COURT: I understand.

8 MS. ROTHMAN: There's a plea agreement that we
9 entered into. The guidelines there are higher. It's 205 --

10 THE COURT: I don't think they are justifiable, the
11 guidelines. I tell you this --

12 MR. TOUGER: Your Honor, can I just respond?

13 THE COURT: No. You don't need to.

14 MR. TOUGER: There is just one -- I have to make one
15 point, your Honor. Derick Bell is Jayquan Smith. Yes, they
16 only caught him with one shooting. They are the same people.

17 THE COURT: I'm punishing Jayquan Smith.

18 MR. TOUGER: I understand that, but one factor the
19 Court must take into consideration is the fact what
20 codefendants got and Derick Bell and Jayquan Smith are the
21 same. The only difference is that Derick Bell hurt two
22 people, actually hit two people. The fact that Derick Bell
23 was given a plea to a seven-year count because he only was
24 charged with one act doesn't take into account the reality of
25 the situation that Derick Bell and Jayquan Smith were running

N2s2SmiS kjc

1 with the same people and doing the same thing and the
2 punishment should be the same. The Derick Bell sentence has
3 just as much impact as the Jayquan Smith sentence.

4 THE COURT: Well, maybe I was influenced by the pleas.
5 I have to be influenced by the plea.

6 MR. TOUGER: But the Court --

7 MS. ROTHMAN: Your Honor --

8 THE COURT: I am --

9 MS. ROTHMAN: -- if --

10 THE COURT: -- discouraged by the Second Circuit in
11 punishing behavior that was not in relationship to the plea,
12 so I'm going to stick to the plea, and I think I've got two
13 things that I am thinking through here and I think I have
14 resolved it.

15 One is that these were really bad acts and there is a
16 necessity to gain respect of the community and to deter others
17 from doing things like this and to punish the individual
18 himself, to deter him. And all of these suggest a very stiff
19 sentence.

20 On the other hand, he is a young man. I believe that
21 everybody is remedial. I mean that everyone's got the spark
22 of the divine in him, and it needs sometimes just to be fanned
23 and furthered to come out. Maybe that's an idealist and
24 romantic belief, but a human life is a terrible thing to waste
25 in jail, and so I have to search for that which fits the crime

N2s2SmiS kjc

1 but also fits the prospects of remediation.

2 MS. ROTHMAN: Your Honor, if --

3 THE COURT: Yeah.

4 MS. ROTHMAN: If I could just make two additional
5 points. When you look at the 3553(a) factors, they all lean
6 in favor of a substantial sentence within the guidelines as
7 calculated by the government or the Court.

8 THE COURT: And you think 14 years is not
9 substantial?

10 MS. ROTHMAN: I don't, your Honor. I think there are
11 a couple of ways you could conclude that.

12 If we are going to compare this to Mr. Bell, one
13 shooting gives you seven years, so let's times it by three and
14 make it 21. Now, I'm not sure the Court should do that. I
15 think the guidelines instruct when you are considering
16 similarly situated defendants you are talking about national
17 averages, not only the defendants in a particular case. But
18 it can't be that the punishment for one is the punishment for
19 three. And in fact --

20 THE COURT: You are arguing under the guidelines that
21 I have not accepted.

22 MS. ROTHMAN: I'm sorry, your Honor?

23 THE COURT: You are arguing about guidelines that I
24 have not accepted.

25 MS. ROTHMAN: Your Honor, I --

N2s2SmiS kjc

1 THE COURT: I've accepted guidelines that go from 135
2 to 168 months, and I am proposing to sentence at the very top
3 of that guideline.

4 MS. ROTHMAN: And I think your Honor has a basis to
5 go above the guidelines that the Court has proposed in light
6 of the repeat nature of the defendant's conduct. Those
7 guidelines, your Honor --

8 THE COURT: But that puts him into category IV and --
9 look, I could vary. It doesn't really make a difference
10 whether it's 14 years or 15 years or 16 years.

11 MS. ROTHMAN: Your Honor, I think there is a basis to
12 vary to the top of what the Court is allowed to do under the
13 20-year statutory maximum here, and that is for -- I think,
14 simply put, the guidelines that the Court calculated only
15 reflect one shooting. That's the first shooting. That's the
16 MTA bus shooting. They do not account for the second
17 shooting.

18 Now, I recognize the Court has ruled on the 924(c),
19 but there is a December 21, 2020 shooting, and there is an
20 April 21, 2021 shooting. Those are not reflected in the
21 guidelines nor is --

22 THE COURT: All right. I'm ready to --

23 MR. TOUGER: Your Honor --

24 THE COURT: I'm ready to sentence.

25 MR. TOUGER: Okay.

N2s2SmiS kjc

1 THE COURT: I think we have heard --

2 MR. TOUGER: I would just say that one factor she is
3 forgetting to mention to the Court is the one that sentences
4 of codefendants must be taken into consideration and two
5 codefendants have been sentenced, one exactly the same as
6 Jayquan Smith, whether he did one shooting or three
7 shootings --

8 THE COURT: I think you made the point. I have it. I
9 am ready to sentence.

10 So what is a sentence that is sufficient but not
11 greater than necessary to comply with the purposes that are
12 set out in more detail? The nature and circumstances of the
13 offense certainly are an argument for a stiff sentence. The
14 history and characteristics of the defendant argue the same
15 way. A stiff sentence would reflect the seriousness of the
16 offense, promote respect for the law, and provide just
17 punishment for the offense, and the same with deterrence of
18 others and the individual.

19 That begs the question what is a stiff sentence?
20 There is no scientific methodology that can assure a judge
21 that he is sentencing leniently or severely or just right.
22 Truth is to say, I don't think I ever really get it just
23 right. I think I am too lenient sometimes. I think I am too
24 stiff sometimes. I never get the satisfaction of feeling I did
25 just the right thing, and so here.

N2s2SmiS kjc

1 Mr. Smith, you are an intelligent man. You have will
2 and you have strength, but you also have a weakness and that
3 weakness gets you on the street and causes you to do bad
4 things. And if you continue to do that, you are going to get
5 killed or you will be in jail. No way to lead a life. You
6 suffered a terrible tragedy in the death of your son, but you
7 get on.

8 I am sentencing you to 168 months, which I consider
9 stiff—it's 14 years—which I think a sentence needs to be,
10 satisfying the conditions I read out in Section 3553(a). That
11 brings you to a point where you get out of jail, you are 38
12 years old and, if you exercise good conduct, maybe a few years
13 earlier than that. That may seem to you a long way off, but
14 life can be long.

15 You have written to me about how you have wanted to
16 turn yourself around, that you feel that you have seen enough
17 courts and done enough bad things. Maybe. But maybe you will
18 be tempted again.

19 I can't tell you that I feel confident that a 14-year
20 sentence is the right one. I'm sure you feel it's too much,
21 and I'm sure that Ms. Rothman feels that it's too little. But
22 I think it is the best I can do. And what you need to do in
23 those 14 years is to understand that if you are back to your
24 old ways, it will be worse the next time. And if you don't
25 get caught, you will get killed on the street. Is that a way

N2s2SmiS kjc

1 to live?

2 You are fortunate in finding a woman who loves you,
3 and you have been together for a little while. Whether
4 that -- I don't know how you continue your life, but you
5 continue. You could find life, you could find hope, you could
6 find love, and you can live responsibly, and that's what you
7 need to do.

8 Following custody, I order a three-year period of
9 supervised release subject to the conditions set out in the
10 presentence investigative report. The mandatory conditions on
11 page 25 I impose. And since you have been around drugs and
12 you have a history of drug use, I will not suspend the
13 provision for drug testing.

14 The standard conditions set out on page 26 and 27 are
15 imposed.

16 I call your attention very much to the point of
17 association with other people whom you know have committed
18 crimes. Choose your friends. Choose your friends so that you
19 are not tempted by what your friends do, that do bad things.

20 The special conditions provide for treatment
21 programs, and the first two paragraphs, I impose them. There
22 is a search requirement in the third paragraph on page 27. I
23 impose that. There is a fourth provision that you not
24 associate or interact in any way, including through social
25 media websites, with any gang members or associates,

N2s2SmiS kjc

1 particularly the gang you were involved in. I impose that.

2 You will be supervised by the district of your
3 residence.

4 I am not imposing a fine. Mr. Smith can't afford a
5 fine.

6 There is a mandatory special assessment of \$200 -- no,
7 of \$100 because I have invalidated one the counts. There is a
8 mandatory special assessment of \$100 which will be due upon
9 filing of the judgment.

10 Restitution is not applicable here.

11 MS. ROTHMAN: No, your Honor.

12 THE COURT: Anything, Mr. Touger.

13 MR. TOUGER: Your Honor, I would only ask that the
14 Court recommend to BOP that they place him in an institution
15 close to New York.

16 THE COURT: Can you repeat that? I recommend what?

17 MR. TOUGER: That BOP place him in an institution as
18 close to New York as possible.

19 THE COURT: Yes, he should be, if possible,
20 institutionalized in a place close to New York to promote
21 visitation from his family.

22 Anything else, Mr. Touger?

23 MR. TOUGER: No, your Honor.

24 THE DEPUTY CLERK: Open counts, Judge.

25 THE COURT: Not yet.

N2s2SmiS kjc

1 I advise you, Mr. Smith, that you have a right of
2 appeal. You should discuss with Mr. Touger whether or not you
3 wish to appeal. If you wish to appeal, Mr. Touger, I instruct
4 you to do so on a timely basis.

5 MR. TOUGER: According to the plea agreement, your
6 Honor, he's waived his right --

7 THE COURT: I'm not interested in the plea agreement.
8 That's for you to decide.

9 Mr. Smith, if you can't afford a lawyer, the
10 government will provide a lawyer free of charge.

11 Are there open counts, Ms. Rothman?

12 MS. ROTHMAN: Yes, your Honor. We would move to
13 dismiss them at this time.

14 THE COURT: We should dismiss them.

15 MS. ROTHMAN: And then, your Honor, I think I have
16 done this, but I will just note the government's objection to
17 the dismissal of Count Ten and also the finding that the
18 defendant is not a career offender.

19 THE COURT: Well, I have already dismissed Count Ten
20 in effect, so I will dismiss Count Ten, and you can appeal if
21 you find error in that.

22 MS. ROTHMAN: I think I am just noting for the record
23 that we object to the Court's dismissal of Count Ten.

24 THE COURT: And if Count Ten is invalidated,
25 presumably you have another count as a felon in possession, so

N2s2SmiS kjc

1 I really don't know how to deal with the underlying counts.
2 All those that are subsumed in the present indictment other
3 than Count Ten or any previous indictment are dismissed.

4 MS. ROTHMAN: I think that's sufficient, your Honor.

5 THE COURT: Mr. Touger.

6 MR. TOUGER: That's okay, your Honor.

7 THE COURT: Okay.

8 Good luck to you, Mr. Smith.

9 oOo